No. 88-1905

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

EDDIE KELLER, *et al.*,
Petitioners,

v.

STATE BAR OF CALIFORNIA, *et al.*,
Respondents.

On Writ of Certiorari to the California Supreme Court

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

This brief *amicus curiae* of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO")—a federation of 90 national and international labor organizations having a total membership of approximately 14 million working men and women—is filed with the consent of the parties as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

I. We first demonstrate that when the government requires individuals to subsidize the activities of an entity, the nature of the governmental action and its effect on individual rights is the same whether the entity designated to collect and to spend the exacted moneys is a traditional, geographically based governmental entity, an innovative governmental entity composed of and responsive to a non-geographically based group with inherent common interests, or a private entity charged with serving the common interests of a group of individuals. Since there is such a requirement here, the issue is not whether *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), applies but what the principle stated there entails, both in general and in this case particularly.

II. A. *Abood*, properly understood, simply cabins government expenditures on, or subsidy of, expressive activity, whatever the nature of that expenditure or subsidy, in two very limited respects: First, *Abood* establishes a "germaneness" test limiting the government's ability *in all contexts* to require that individuals contribute to expressive activities. That standard preserves the ability of traditional, geographically-defined governmental entities to spend tax-derived funds for speech purposes upon the subjects entrusted to that particular entity. And that standard also allows legislatures to devise novel stat-

utory schemes that provide for democratic decisionmaking among groups defined by common interests that are *non*-geographical, such as a common endeavor (*e.g.*, studying at the same university), a common commercial interest (*e.g.*, selling apples or producing beef) or a common occupation (*e.g.*, practicing law or teaching in public schools). Second, *Abood*, and other cases of this Court, erect an *absolute* prohibition upon expending mandated fees of any kind in a partisan fashion upon candidates for elective office.

B. Thus, under *Abood*, the State Bar may use mandatory contributions to fund *any* expressive activities germane to the legislative purposes carried out by the Bar, whether "ideological" or not. And there is no requirement under *Abood* that the legislative purposes be narrowly drawn, or strictly regulatory. An important legislative purpose of California's State Bar Act is to obtain the combined expertise of the State's attorneys on matters relating to the administration of justice and the science of jurisprudence. The challenged activities involving lobbying, the filing of *amicus curiae* briefs, and the Conference of Delegates are constitutional, because these activities relate to the Bar's broad administation of justice functions, and do not entail an impermissible involvement in partisan electoral policies.

ARGUMENT

Introduction

This case concerns the petitioners' First Amendment challenge to certain expressive activity of the State Bar of California. In ruling on that challenge, the California Supreme Court held that the State Bar *is an integral part of the State government.* That state law ruling is, of course, authoritative.

The First Amendment—like the balance of the Bill of Rights—was proposed and was made part of the Constitution as a check on the *government.* Indeed, no rule

of constitutional law is more firmly established than that the Bill of Rights applies only to state action and not to private action.

In this litigation, however, the determination that the entity whose expressive activity is alleged to be prohibited by the First Amendment is a *governmental actor* has been held to *defeat* the constitutional claim. According to the California Supreme Court, *because* the State Bar is a governmental entity, the Bar is entitled to exact fees and to spend the moneys so collected free of any First Amendment limitations, although, were the Bar a private entity, the First Amendment's limitations would apply.

The California Court came to this paradoxical conclusion as its reconciliation of two lines of authority in this Court: On the one hand, this Court's jurisprudence indicates that, as general matter, the First Amendment does *not* limit government speech on secular issues of public importance financed through compulsory taxation, and that taxpayers do *not* have any constitutional right to a pro-rata reduction of their taxes because the taxpayers disagree with one or more of the uses to which those taxes are put, expressive or otherwise. On the other hand, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and its progeny place *some* limitation, albeit a narrow one, upon the authority of purely private entities to spend fees that individuals are compelled, through any form of state action, to contribute: Such an association may not expend exacted fees "on behalf of political candidates, or towards the advancement of other ideological causes not germane to" the "cause which justified bringing the group together." *See id.* at 222-23 & 235.

The California Court was of the view that these two lines of authority are reconcilable only upon the startling premise that the *more* direct the governmental involvement in collecting compelled payments and expending the resulting fund on expressive activity, the *less* the First Amendment limits those expenditures.

Petitioners' solution to this apparent anomaly—and the solution proposed in the concurring and dissenting opinion below—is to agree with the California Court that governmental entities *of some kinds* are not limited by the First Amendment in their expenditure of exacted payments, collected in the form of taxes, for expressive purposes, but to maintain that *both* private entities and *certain* governmental entities of which the State Bar is one, are subject to limitations of the kind imposed in *Abood*.

On this view, there is a fundamental difference of constitutional dimension between the compulsory payment of taxes to support expressive activity by traditional, geographically-based governmental units and all other forms of governmental compulsion to support expressive activity. The difference does not inhere, however, in the governmental or non-governmental nature of the spending entity, but, instead, upon some critical difference between taxes and other forms of dues and fees that the government requires to be paid. *See* Petitioners' Opening Brief at 20-23; *see also, e.g.*, Pet. App. A-46—A-50 (Kaufman, J., concurring and dissenting); *United States v. Frame*, 885 F.2d 1119, 1132-33 (3rd Cir. 1989); L. Tribe, *American Constitutional Law* 807-808 n.14 (1988).

We agree with the State Bar that the proffered distinction between taxes and other forms of governmentally-compelled payments for purposes of determining whether First Amendment interests are implicated by the compelled payment will not bear close analysis. And we agree as well that the Bar is permitted by the Constitution to spend funds derived from exacted fees upon all the activities the Bar is authorized to engage in by the applicable state law as construed by the California Court.

We propose, however, an alternative analytical framework for reaching these eminently sensible results that is consistent with the basic understanding that the First Amendment regulates government action. In essence, we submit that all the various forms of governmental support for expressive activity and for association to engage in expressive activity, implicate the same First Amendment interests, while the result of balancing those interests against the proffered governmental justifications for compelled financial support of expression will differ depending upon the strength of that justification.

I. Government Supported Speech Generally.

A. "It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state." *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976). It is equally plain that "[a] government 'normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]' ". *San Fran. Arts & Athletics, Inc. v. U.S.O.C.*, 483 U.S. 533, 546 (1987) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) and *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982)).

Consistent with this understanding of the First Amendment's limited, albeit critical, office in our governmental scheme, this Court's cases on the status of union security agreements (*viz.*, agreements requiring all covered employees to pay dues and initiation fees to the labor organization selected as the exclusive bargaining representative of a particular employee group) turn on the conclusion that the compulsion to pay union dues and fees is a *governmental compulsion*, although the entity spending the fees is private.[1]

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[1] In several cases under the Railway Labor Act ("RLA") and National Labor Relations Act ("NLRA"), this Court has held that Congress has, as a *statutory* matter, restricted the expenditure of mandated fees (*Machinists v. Street*, 367 U.S. 740 (1960); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Communications Workers v. Beck*, —— U.S. ——, 108 S. Ct. 2641 (1988)), and has emphasized that the statutory limitations do not hinge upon "constitutional concerns", but are valid "regardless of whether the negotiation of union security agreements under the [particular statute] partakes

In the RLA cases, although the decision to require a mandatory fee is made by two private entities, a private employer and a union, and although decisions about the expenditure of the mandatory fees are made entirely by a private entity, the union, the state action derives from the RLA's preemption of state law forbidding union security agreements. *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956). In the public employee cases, the state action is found in the fact that the compulsory fee requirement is set in part by a governmental entity, the public employer, as one party to a collective bargaining agreement. *Abood*, 431 U.S. at 218 & n.12; *Wygant v. Jackson Board of Education*, 476 U.S. 267, 273 n.4 (1985). And under the NLRA, because neither of these circumstances pertain, this Court has explicitly left open the question whether the First Amendment in any way limits the collection or expenditure of mandatory fees under union security provisions. *Communications Workers v. Beck*, *supra*.

Indeed, in *Abood*, *supra*, the major point of disagreement between the majority and the dissenters was whether the nature of the governmental involvement under the RLA, a statute regulating only private employees, and the governmental involvement under a state statute governing the employment of *public* employees is sufficiciently different to mandate a different result under the First Amendment in the latter situation, more restrictive of the right of a private entity to spend mandated fees. The dissent maintained that

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of governmental action." *Communications Workers v. Beck*, 108 S. Ct. at 2657. Similarly, the California Supreme Court, in *Cumero v. Public Employment Relations Board*, 49 Cal. 3d 575 (1989), recently held, without regard to the First and Fourteenth Amendments, that the California statute governing collective bargaining for educational employees forbids unions operating under that statute to spend compelled fees for "most lobbying and electioneering expenses as well as the costs of recruiting new members." *Id.* at 582.

The arguments we make in this brief do not, of course, directly affect those statutory holdings.

> The State in this case has not merely authorized union-shop agreements between willing parties; it has negotiated and adopted such an agreement itself. . . . Accordingly, the Board's collective bargaining agreement, like any other enactment of state law, is fully subject to the constraints that the Constitution imposes on coercive governmental regulation.
>
> Because neither *Hanson* nor *Street* confronted the kind of governmental participation in the agency shop that is involved here, those cases provide little or no guidance for the constitutional issues presented in this case. [431 U.S. at 253-54.]

The majority, however, found this proposition "somewhat startling." 431 U.S. at 227 n.23. Maintaining instead that the applicable First Amendment principles are triggered by governmental compulsion generally, and do not vary depending upon whether "the governmental action operate[s] less directly", *id.*, the *Abood* majority agreed with Justice Douglas that

> Since neither Congress nor the state legislature can abridge [First Amendment] rights, they cannot grant the power to private groups to abridge them. As I read the First Amendment, it forbids any abridgement by government, whether directly or indirectly. [*Id.*, quoting *Machinists v. Street*, 367 U.S. at 777 (Douglas, J., concurring).]

Further, the precedent upon which *Abood* placed its main reliance in finding that there are at least *some* limitations upon the uses to which mandated union fees may be devoted is a case limiting the *government*'s authority to compromise freedom of conscience by compelling allegiance to a *governmentally*-prescribed message: *Board of Education v. Barnette*, 319 U.S. 624 (1943). In *Barnette*, the Court stated that

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. [*Id.* at 642].

See also Wooley v. Maynard, 430 U.S. 705 (1977).

Abood went on to conclude that an individual's freedom of conscience may, in some circumstances, be compromised not only by requiring the kind of direct, personal affirmation of belief at issue in *Barnette*, but also by requiring an individual "to make . . . [financial] contributions for political purposes. . . ." 431 U.S. at 235. The language in *Abood* to this effect is general; there is nothing in the opinion indicating that the principle derived from *Barnette* applies only when the government compels financial support of a private entity's speech and not when the compelled payment supports governmental speech.

Abood and its progeny repeatedly quote James Madison's proclamation that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever", and Thomas Jefferson's statement that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." 431 U.S. at 234 n.31. *See also Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305 n.15 (1986).[2] Again, these very general statements of the freedom of conscience ideal on which *Abood* rests make no distinction between government compelled payments to government itself which are used for the support of government expressive activities and government compelled payments to private entities which are used for the entity's expressive activities.

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[2] As the context of the Madison and Jefferson statements demonstrates, the form of compelled funding with which the founding fathers were most concerned was the funding of *religion*. That concern, of course, found expression in the Establishment Clause of the Constitution, a clause with no direct counterpart as to speech in general. *See Buckley v. Valeo*, 424 U.S. at 91-92. Under the Establishment Clause, no distinction is made between mandated direct contributions to religious institutions and mandated contribution through the expenditure of tax-generated revenues for religious purposes. *E.g. Everson v. Board of Education*, 330 U.S. 1 (1947).

Thus, the *Abood* line of cases does *not* rest, as the California Supreme Court supposed, upon the notion that the First Amendment necessarily places *greater* restrictions on expenditures of government mandated fees by private entities to finance expressive activities than the Amendment places upon the government when it funds its own speech (a notion that, as we stressed at the outset, would be entirely incompatible with the state action doctrine). Rather, *Abood*'s premise *is that the government may not escape First Amendment strictures by providing a private entity the means to do what the government may not itself do. Abood*, in other words, begins the process of ascertaining and articulating the basic First Amendment principles concerning the very limited way in which the Constitution cabins the government's authority to finance expression generally. *Accord*, L. Tribe, *American Constitutional Law*, 807-808 n.14; Schiffrin, *Government Speech*, 27 UCLA L. Rev. 565, 588-95 (1980).[3]

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[3] There *is one* major way in which the impact of *Abood* differs significantly depending upon whether the entity expending compelled funds is governmental or nongovernmental:

> Where the entity is governmental, the authority of that entity to engage in a certain activity at all, expressive or otherwise, is subject to legislative control, and to the strictures of the Constitution. *Cf. Anderson v. City of Boston*, 380 N.E. 2d 628 (Mass. 1978), *appeal dismissed*, 439 U.S. 1060 (1979) (holding that legislative prohibition upon expenditure of tax-generated funds by a city to propagate views on an initiative measure is valid as protective of the interests of citizens in not funding ideas with which they disagree); Pet. App. A-26 - A-30 (holding that in conducting certain of the protested activities the States Bar "exceeded its statutory authority").
>
> In contrast, where the entity expending mandated fees or taxes is private, the entity has First Amendment interests of its own, which the legislature and the courts are bound to respect; any legislative or constitutional inhibitions upon the expenditure of compelled fees must, therefore, be remedied in a way that does not constrain the ability of the organization to carry on its chosen activities with voluntary funds. *Machinists v. Street*, 367 U.S. at 772-773; *Abood*, 431 U.S. at 238.
>
> The consequence may well be that in the rare case where the complaint upheld is that a governmental entity is spending man-

B. The conclusion that *Abood* states a unitary principle applicable at its broadest level to any and all government actions that enhance speech is reinforced by giving closer consideration to the different ways in which the government supports expression, and to the precise nature of the interference with First Amendment interests worked by requiring monetary support for the resulting speech in each context. As a general matter, there are at least four different ways in which the government may require an individual to contribute money to the propagation of ideas with which the individual may disagree.[4]

First, the government can spend tax-derived funds upon the direct expression of ideas, political or otherwise.[5]

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dated fees or taxes in a way that infringes the First Amendment interests of dissenting feepayers or taxpayers, a simpler remedy than the complicated pro rata reduction used in the union security cases could be devised.

[4] For simplicitly sake, we discuss here the circumstances in which the *only* sense in which an individual is being compelled to lend support to the propagation of ideas in which he or she disbelieves is by the payment of money into the fund from which the objectionable expenditure is made, directly or indirectly. There are, as well, other forms of compelled support of expression; for example, those which involve mandatory use of either governmental or private physical property to enhance the speech activity of the government or of private persons. *See, e.g., Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (requirement that a shopping center owner permit use of his property by groups wishing to communicate with shoppers); *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1 (1986) (requirement that a company permit certain groups to use the company's billing envelop to communicate their views).

[5] *E.g., Citizens to Protect Public Funds v. Board of Education*, 13 N.J. 172, 98 A. 2d 673 (N.J. S.Ct. 1953) (circulation of both information upon and governmental entity's opinion upon a school bond election); *Board of Education v. Barnette*, 319 U.S. at 640 (contrasting "[n]ational unity as an end which officials may foster by persuasion", presumably financed by tax revenues, with the direct affirmation of belief involved in that case); *Wooley v. Maynard*, 430 U.S. at 717 (state may communicate "an official view as to

Second, the government can contract with a private entity for the payment of tax-derived funds for a public service that involves expression on the condition that the private party in carrying out that service follow the same line as the government would take.[6]

Third, the government can subsidized private entities speaking on their own behalf, rather than on behalf of the government.[7]

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proper appreciation of history, state pride, and individualism . . . in any number of ways").

Many instances of governmental expression on its own behalf upon controversial political issues are so commonplace, and so accepted, that disputes concerning the validity of such expression simply do not arise. For example, the executive branch of government is certainly expected to present its views to the legislature upon questions before the legislature. *See generally* M. Yudof, *When Government Speaks* (1983).

[6] *E.g. Webster v. Reproductive Health Services*, —— U.S. ——, 109 S. Ct. 3040 (1989) (conditioning receipt of government funds upon promotion of the government's views about abortion).

[7] *E.g., Regan v. Taxpayers with Representation of Wash.*, 461 U.S. 540 (1983) (tax deduction for lobbying activities of certain private organizations); *Board of Education v. Pico*, 457 U.S. 853 (1982) (selection of books for a public school library); *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984) (government financial assistance to noncommercial, educational broadcasting); *Buckley v. Valeo*, 424 U.S. 7 at 90 et seq. (public funding of presidential election campaigns); *see also id.*, at 93 n.127 ("Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media, 47 U.S.C. §§ 390-299, and preferential postal rates . . . for newspapers. 39 CFR § 132.2 (1975)"); *Perry Ed. Assn. v. Perry Local Educators Assn.*, 460 U.S. 37 (1980) (tax-funded internal mail system, available to carry government messages and those of selected private groups); *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788 (1985) (government-sponsored fund raising campaign, accessible to selected private groups).

Other examples of government subsidy to private groups and individuals for expressive activity include the National Endowment for the Humanities (20 U.S.C. § 956 et seq.), the National Science Foundation (42 U.S.C. § 1861 et seq.) and the National Endowment

And, fourth, the government can require that certain similarly situated individuals pay fees, whether denominated taxes or not, directly to an entity controlled by such individuals collectively and empowered either exclusively, or as part of its activities, to expend funds for expressive activities as determined by the group.[8]

1. The core situation at issue is the one in which the government levies, collects and spends tax revenues. And this Court has repeatedly ruled, albeit without explaining its reasoning in great depth, that as a general matter, the First Amendment does *not* limit the government's authority to expend tax-derived revenues on stating the government's own position on public issues, and on subsidizing the expression of ideas by private entities.[9]

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for the Arts (20 U.S.C. § 954 et seq.), all of which operate in large part by providing grants to private individuals and groups for scholarly or artistic work, and the federal Legal Services Corporation, which provides funds for legal advocacy to private nonprofit organizations (42 U.S.C. § 29960).

[8] The obvious examples are the present one, involving an integrated bar association, and the union security arrangements involved in *Abood* and *Hudson*. *See also, e.g., Consumers Union of United States, Inc. v. California Milk Producers Advisory Bd.*, 82 Cal.App.3d 433, 438 (1978) (noting existence of 92 state boards in California funded through fees imposed upon individuals and groups involved in certain fields of production or trade); *United States v. Frame, supra* (beef advertising funded through compulsory fees imposed by the government upon entities involved in the production of beef); *Arrington v. Taylor*, 380 F.Supp. 1348 (M.D.N.C. 1974), aff'd mem. 526 F.2d 587 (4th Cir. 1975) (speech funded through student activity fee paid by all students at a university); *Veed v. Schwartzkopf*, 353 F.Supp. 149 (D.Neb.), aff'd mem. 478 F.2d 1407 (8th Cir. 1973), cert. denied, 414 U.S. 1135 (1974) (same). *Cf. Cahill v. Public Service Commission*, 69 N.Y. 9d 265, 506 N.E. 2d 187 (N.Y. Ct. App.1986) (charitable contributions funded through utility charges).

[9] Where the government is subsidizing the speech of others rather than speaking directly on its own behalf, the First Amendment does place some limits upon the government's discretion to choose among the speakers to be subsidized.

For example, Congress has the power to appropriate money to finance election campaigns according to neutral criteria without permitting "taxpayers to designate particular candidates as recipients of their money." *Buckley v. Valeo*, 424 U.S. at 92. In rejecting the claim that this infringes on the First Amendment rights of taxpayers who do not wish their money to go to a particular candidate, the *Buckley* Court said

> The fallacy of appellants' argument is . . . apparent; every appropriation made by Congress uses public money in a manner to which some taxpayers object. [*Id.* at 96.]

Moreover, Congress does not run afoul of the First Amendment by subsidizing through a tax deduction lobbying activity by certain private groups but not others. *Regan v. Taxation with Representation of Wash., supra.* Nor do taxpayers have any constitutional right to object to the expenditure of tax funds by private organizations for the purpose of editorializing on publically-funded radio stations:

> This argument is readily answered by our decision in *Buckley v. Valeo*, [*supra*]. As we explained in that case, virtually every congressional appropriation will to some extent involve use of public money as to which some taxpayers may object. . . . Neverthe-

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Primarily, the government may not, in choosing which groups or ideas to subsidize, "discriminate invidiously in such a way as to 'aim at the suppression of dangerous ideas'". *Regan v. Taxation with Representation of Wash.*, 461 U.S. at 548. *See also Board of Education v. Pico*, 457 U.S. at 871 (plurality opinion) *id.* at 879 (opinion of Blackmun, J.). *Cf. Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. at 811 (in choosing which organizations to admit to a "nonpublic forum," the government has wide discretion by may not engage in "viewpoint-based discrimination.")

For present purposes, what is significant about these limitations is that they are grounded not in concern for the freedom of conscience of taxpayers but, instead, in the impact of the governmental decision upon need to protect the "public access to discussion, debate and the dissemination of information and ideas." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978).

> less, this does not mean that those taxpayers have a constitutionally protected right to enjoin such expenditures. [*FCC v. League of Women Voters of California*, 468 U.S. at 385 n.16.]

The government may, moreover, "communicate to others an official view as to proper appreciation of history, state pride, and individualism . . . in any number of ways." *Wooley v. Maynard*, 430 U.S. at 717; *see also Board of Education v. Barnette*, 319 U.S. at 640.

As these cases recognize, upon even the briefest consideration it is apparent that where the only sense in which there is a requirement of compelled support for expression is that some small amount of money paid into a general fund will be used for that purpose, the individual making the payment has a most limited First Amendment interest. The interest in contributing money to others for speech-related purposes is "marginal . . . since the expression rests solely on the undifferentiated symbolic act of contributing . . ." and since "the transformation of contributions into political [or ideological] debate involves speech by someone other than the contributor." *Buckley v. Valeo*, 424 U.S. at 20-21.[10]

Further, where the objection is to compelled association or to compelled support of expression *only* in the form of exacted payments to a general fund, "the broader concept of individual freedom of mind" that underlies the First Amendment protection of the right *not* to speak and the right *not* to associate, *Board of Education v. Barnette*, 319 U.S. at 633-34, 642, is implicated only in an attenuated sense. As this Court has observed, "unlike *Wooley*

[10] This Court has in the years since *Buckley* repeatedly recognized that monetary payments for expression, as "speech by proxy," involve only "some limited element of protected speech" *California Medical Association v. Federal Election Commission*, 453 U.S. 182, 196 & n.16 (1981) (plurality opinion, cited with approval in *Federal Election Commission v. Massachusetts Citizens for Life*, —— U.S. ——, 107 S. Ct. 616, 629 (1988)), and has "consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending," 107 S. Ct. at 629.

v. Maynard," where the government sought to require an individual to *directly* facilitate such expression, there "is not a case in which an individual taxpayer is forced in his daily life to identify with particular views . . ," *FCC v. League of Women Voters of California*, 468 U.S. at 385 n.16, where the only connection between an individual and ideas with which he or she disagrees is that the speech in question is funded with a share of the individual's tax payments.

Since there is no such mandatory intimate connection, the government is not directly "invad[ing] the sphere of the intellect and spirit which it is the purpose of the First Amendment to reserve from all official control," *Board of Education v. Barnette*, 319 U.S. at 642. *See also Pruneyard Shopping Center v. Robins*, 447 U.S. at 85-88 (no infringement of right not to speak or not to associate where the only required connection between an individual and the expressive activities of others is use of the individual's property generally open to the public).

2. Mandatory subsidization of speech through general taxes of the kinds involved in the cases just discussed is based on "membership" in a particular geographical unit: As a condition of living in a particular country, state, or city, an individual may be required to assist in financing programs of common interest to the residents of that area, including expressive conduct with which he may disagree. The geographical political subdivision may be a large state with broad authority, or it may be a small town of several hundred people, perhaps, with very limited responsibility in the overall governmental scheme.[11]

[11] The breadth of the common interests in geographically-based governmental units will vary with the geographical and substantive breadth of the unit. Thus, the national government is concerned with the common interest in defense, but, because of substantive determinations made in the Constitution, state governments are not. New York concerns itself with transportation into and within New York, but has no direct role in determining bus routes in California. Public utility districts are concerned *only* with the common needs of the populace they serve for water or electricity,

In addition, some traditional governmental entities funded through taxes are geographically defined but limited in their substantive purview; school boards and other special districts, such as park districts, public utility districts, and transportation districts, exemplify this category.

A geographical definition of commonality is the most concrete, defined as it is by physical boundaries, and the most traditional. But, as Justice Douglas recognized in his concurrence in *Machinists v. Street*, *supra* (upon which the *Abood* majority relied, 431 U.S. at 223), often "in an industrial society . . . an association with others is compelled by the facts of life," 367 U.S. 740, 775-76 (Douglas, J., concurring). Thus, lawyers in a state, students in a state university, and employees in an industry constitute what social scientists denominate a "latent" group—*viz.*, "a number of individuals with a common interest," M. Olson, *The Logic of Collective Action* (1964) p. 8—whether or not the individuals are bound to a formal organization. By aiding in the expression of the interests and the abilities of a "latent group" through a formal, democratically-organized entity charged with representing the group as a whole—such as an integrated bar association—the government provides the same kind of limited self-determination for subgroups of citizens as a traditional local, geographically based subdivision, with limited but important responsibilities and prerogatives, provides.[12]

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and not with other aspects of the lives of the people who live within the district's geographical boundaries.

[12] Certain of the *amici curiae* supporting petitioners appear to contest the government's authority to establish non-geographically based entities for *any* purpose, contending that the Constitution commands that no governmental powers may be delegated to entities formed along occupational or industry lines. *See* Brief Amicus Curiae of Trayton L. Lathrop, at 3-6; Brief Amicus Curiae of the National Right to Work Foundation, at 7 n.8, 14-19. For this proposition these *amici curiae* rely on cases as diverse—and as far from the instant case—as *A.L.A., Schecter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935) and *Reynolds v. Sims*, 377 U.S. 533 (1964).

Concomitantly, *from the point of view of the complaining individual*, there is no self-evident difference in principle between the compulsion to pay taxes to a geographically defined governmental entity, where some of the receipts are used for expressive activity with which the individual disagrees, and a government requirement—imposed by a geographically defined governmental entity—to pay fees to an interest-based governmental entity or to a private entity, where the latter engage in expressive activity as one among many activities. In either case, the individual is in some way, albeit a rather removed one, aiding the expression of ideas with which he or she disagrees, and in either case, there is no substantial connection between the individual and the positions he or she would prefer not to support *other than* the payment into a fund from which the expression is financed. *See generally* Schiffrin, *Government Speech*, 27 UCLA L. Rev. 565, 588-94 (1980).

In particular, there is no reason to believe that the degree of either actual or perceived identification between compelled taxes or fees and government-assisted speech would necessarily differ according to whether the speaker

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Justice Harlan, in his concurring opinion in *Lathrop v. Donohue*, 367 U.S. at 854-55, fully exposed the multiple and fatal errors in this line of argument. *See also* Jaffe, *Law Making by Private Groups*, 51 Harv. L. Rev. 201 (1937); Liemann, *Delegation to Private Parties in American Constitutional Law*, 50 Ind. L. J. 650 (1975).

In this case, however, the challenge is not to any regulatory powers that the State Bar may have but, instead, solely to the Bar's authority to communicate with those governmental entities that *retain* traditional governmental authority, principally the legislature and the courts. Petitioner's Opening Brief, at 24. Insofar as the Bar simply communicates its views to other entities with the power to decide issues of law and policy, the Bar is not legislating in any sense whatever, and no delegation concepts pertain. Further, since the decision to exact fees was made by the *State Legislature*, that decision, also, has in no sense been delegated to the Bar.

is a geographical governmental entity, a non-geographical governmental entity, or a private entity. Most people know that the position of a group, especially a large one, on an issue cannot possibly reflect the unanimous opinion of all members, any more than the position of a city council on an issue reflects the unanimous views of all citizens of a city. *See Lathrop v. Donahue*, 367 U.S. at 859 (Harlan, J. concurring) ("Surely the Wisconsin Supreme Court is right when it says that petitioner can be expected to realize that 'everyone understands or should understand' that the views expressed are those 'of the State Bar as an entity separate and distinct from each individual' ") (quoting *In Re Integration of Bar* 5 Wis.2d 618, 623 (1958)).

Further, the State Bar of California (or, for that matter, a diversified national union of several hundred thousand people, such as the one involved in *Communications Workers v. Beck*, *supra*) has considerably more members, and is considerably more multifaceted and complex in its goals, activities, and internal operations, than a small town school district (*see Citizens to Protect Public Funds v. Board of Education*, *supra*) or than many other traditional geographically-based governmental units.

There is consequently no basis for drawing a line between traditional governmental entities and other entities supported by exacted fees on the basis that the individual's contribution is converted more directly, or more perceptibility, into the entity's expression in the one instance than in the other. Rather, in all these instances, the individual contributes to a general fund, where his or her contribution is commingled with all other exacted contributions and where the fund is then devoted to those projects, expressive and otherwise, that the entity as a whole has decided to pursue.[13]

[13] Where government is funding speech through traditional taxation, there may be several decision-making junctures before the allocation of funds to speech activity is determined. For example, when the government funds public broadcasting, it is the broadcaster, not the government, that decides upon the programs to be broadcast and the ideas to be expounded. *FCC v. League of Women Voters of California*, 468 U.S. at 367-69.

We cannot fathom how any difference of constitutional dimension turns upon whether one or two layers of decisionmakers operate upon the commingled funds before those funds are devoted to expressive purposes. Indeed, when a traditional governmental entity is speaking directly, or when exacted fees are collected by a non-geographical governmental entity, or by a private entity, the entity deciding upon speech allocation is the same one that collects the exacted fees initially. The State Bar, for example, divides exacted fees between the activities within its purview in precisely the same way as a local school board treats tax revenues.

Thus, if direct payment to the entity in whose name the speech occurs raised the constitutional stakes, then the most traditional form of governmental speech, that conducted by a *geographically-based governmental entity in its own name*, would be subject to heightened scrutiny.

[14] Given the degree of reliance placed upon Justice Powell's insistence that there is a difference of constitutional dimension between taxes and any other form of governmentally-exacted fees used for expressive purposes (*see* Pet. App. A-50-51; Petitioner's Opening Brief at 21), it bears emphasis that Justice Powell was in *dissent* in *Abood*, and was offering the proffered distinction to explain why, in his view, the majority opinion was *insufficiently* protective of First Amendment rights. *See* 431 U.S. at 255-59 (Powell, J., concurring in the judgment).

Nor is the line of demarcation suggested by Justice Powell in his dissent in *Abood* a viable one for distinguishing between the First Amendment implications of taxation to finance expressive activities and of other government-exacted fees to finance expressive activities.[14] Justice Powell recognized that "a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent" but maintained that

> the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. . . and [not] only of one segment of the population, with certain common interests. [431 U.S. at 259 n.13].

Neither side of this abstract equation is correct.

First, as we have seen in this country, there is not one government, representative of "the people," but a complex set of thousands of governmental bodies with different geographical and substantive jurisdictions. The national government represents "the people" as a whole, in some sense, but only as to those substantive matters committed to the national government in the Constitution, while the states and their various subdivisions are restricted to representing "only one segment of the population, with certain common interests." As to traditional governmental entities, those common interests arise because individuals who live in a contiguous area are commonly affected by questions concerning the provision of common services for that area.

On the other hand, while it is true that traditional governmental entities are "representative" of the individuals within their sphere of authority in the sense that the governors are elected by those individuals (or at least by such of them as are citizens and of voting age), the State Bar, unions, and other entities charged by statute with representing the interests and views of a group of individuals with functional, rather than geographical, common interests and authorized to compel the payment of fees are also typically set up in accord with democratic ideals. And the group of individuals entitled to a voice in the decisionmaking process is coextensive with the group required to pay the exacted fees. Thus, the individuals who are complaining that their funds are being used for expressive purposes with which those individuals disagree had the opportunity, if they cared to use it, to vote for a member of the State Bar Board of Governors, and through that vote to influence the position taken by the Bar with the use of those funds on issues before the legislature and the courts.[15] Their complaint, then, is

[15] The State Bar of California is unusual, perhaps, in that some of the members of its Board of Governors are nonlawyers, appointed by the Governor rather than elected by the State's lawyers.

identical to that of dissenting taxpayers; *viz.*, that the dissenters failed to prevail in the political process, and now wish to succeed by crippling the financial ability of the Bar to carry out the program approved through the internal, democratic political process.

Finally, the line suggested in the concurring and dissenting opinion below between taxation and other forms of government-mandated financial support—such as that involved in this case—is equally unpersuasive. That opinion suggests that the principles established in *Abood* depend on the precise sense in which fees are compulsory: Where the fee-paying requirement is a condition of pursuing one's chosen means of earning a livelihood, special scrutiny is necessary, while, apparently, a generally deferential standard applies where the financial requirement—taxation—is merely enforced by criminal sanctions. Pet. App. A-46-A-49. Merely to state this proposition is to refute it; plainly, if the issue is comparative coercion, the level of coercion involved in levying and collecting taxes is *greater* than the level of coercion involved in requiring that an individual who has voluntarily chosen to practice law in California pay the requisite mandatory fee for doing so.[16]

Pet. App. A-9. Surely, however, insofar as the Bar is governed by individuals directly responsible to the state government itself, the attempt to distinguish the Bar from traditional state entities funded through taxation becomes all the more ephemeral.

[16] In addition, the case upon which the concurring and dissenting opinion relies for the proposition that the right to practice law is a "fundamental" right (as well as, apparently, for the broader proposition that "the pursuit of one's livelihood" generally is constitutionally fundamental (Pet. App. A-48-49)) clearly does not hold that restrictions on the practice of law are "fundamental" in the sense that those restrictions are subject to particularly stringent judicial scrutiny. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 281 (1985) was a case decided under the Privileges and Immunities Clause, and determined only that in terms of the purpose of *that clause*—preserving the interchange of commerce among the several states—protecting the right to pursue a profession is "fundamental". Neither *Piper* nor any other case of this

In short, there is no principled basis for subjecting to strict judicial scrutiny legislative determinations that require or permit the exaction of fees from members of groups with common interests and responsibilities, while at the same time permitting the government wide authority to expend tax-generated funds for purposes of direct or subsidized expression of ideas. And as we now show, this Court has *not* in fact sanctioned such a dichotomy.

II. Applying The *Abood* Standard.

A. Contrary to what one would suppose from a reading of petitioners brief or the opinion below, *Abood* does not hold that each expenditure made by an entity through the use of exacted fees is subject to a separate, traditional First Amendment strict scrutiny analysis, any more than the Court has ever held that "a local school board . . . need[s] to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent," 431 U.S. at 259 n.13.[17]

Court holds that, as a general matter, regulation that impinges upon an individual's ability to pursue an occuaption is, without more, subject to strict scrutiny.

[17] Indeed, the disagreement between the majority and the dissent in *Abood* focussed precisely upon the fact that, as the dissent pointed out, the majority did *not* subject either the overall justification for union security agreements nor the specific union expenditures financed by exacted fees to traditional First Amendment strict scrutiny. *Compare*, 431 U.S. at 222 ("the judgment clearly made in *Hanson* and *Street* is that *such interference as exists* is constitutionally justified by the legislative assessment of the *important* contribution of the union shop"), *with id.* at 255 ("the State should bear the burden of proving that any [exacted] union dues or fees . . . are *needed* to serve *paramount* government interests"). (Emphasis supplied).

There are two later cases in which this Court has applied the general First Amendment analysis of *Abood*. The first, *Ellis v. Railway Clerks*, *supra*, does characterize the First Amendment interests affected by the exacted payment requirement as "significant," 466 U.S. at 455, but then goes on to hold that where justified by a governmental interest, even expenditures that "have direct communicative content and involve the expression of ideas" are

Nor did *Abood* rule that expenditures on expressive activity generally, or, on "ideological" expression such as communicating with the courts or the legislature, particularly, must be independently justified. Indeed, any such rule, would have been difficult to square with the basic holding of the case, that fees for the purpose of collective bargaining may be exacted; there is simply no difference of constitutional dimension between being required to con-

"well within the [constitutionally] acceptable range," *id.* at 456-57. Thus, *Ellis* does *not* hold that the justifying governmental interest must be compelling, and does not subject even expenditures to finance the communication of ideas to a least restrictive alternative analysis; rather the "germaneness" test of *Abood* applies. Whether or not the passing characterization of the First Amendment interest as "significant" is precisely square with *Abood's* language or with the treatment of the same kind of interest in the cases involving government speech financed by taxation, the approach of *Ellis*—allowing fairly free reign to government-aided speech—is consistent with the analysis developed in the text.

Similarly, *Chicago Teachers Union v. Hudson*, *supra*, does cite cases in which infringements on much more substantial freedom of association and expression interests were subject to strict scrutiny, but does not indicate that the interest in not being subject to a government requirement of financial support for expressive activity is *for all purposes* the equivalent of those other interests. In this regard, *Hudson*, 475 U.S. at 302-304, cites both *Roberts v. Jaycees*, 468 U.S. 609 (1984) and *Elrod v. Burns*, 427 U.S. 347 (1976). *Roberts*, of course, did not involve the interest of an individual in not associating with others at all claimed here but the interest of a *group* joined together for expressive purposes to define its own rules regarding the group's composition. Thus, in that case the right of nonassociation was a direct adjunct of—and drew its strength from—an affirmative associational right. And *Elrod* involved the rights of association and expression concerning partisan support of a political candidate. As we explain in the text, those rights *do* involve heightened First Amendment concerns, for reasons of democratic theory that go well beyond the concern with safe-guarding each individual's freedom of belief. Further, both *Roberts* and *Elrod* involved more direct infringements on associational interests than the required payment of funds without more. *Hudson* did not treat expressly with these important differences one way or the other, but did characterize the "infringement on nonunion employees constitutional rights" in the union security context as *"limited."* 475 U.S. at 303 (emphasis added).

tribute over objection to communications with a school board or other public entity at the bargaining table, and being required to contribute over objection to communication on the same subject with other public officials.

Rather, *Abood* imposed only two limitations upon the expenditure of exacted fees, both of which apply generally to government entities expending, or providing for the expenditure of, exacted funds. *First*, such funds may not be spent "to contribute to political candidates." 431 U.S. at 234. And, *second*, such fees may not be used "to express political views unrelated to [the 'cause which justified bringing the group together']". *Id.*[18]

1. The first *Abood* limitation has no direct application here. It is worth noting, nonetheless, in the interest of sustaining our basic proposition that *Abood* states only narrow limiting principles applicable to government-assisted speech generally, that the limitation upon partisan assistance to candidates *is* one that applies across the board for reasons that go far beyond protecting an individual's freedom of conscience.[19]

The First Amendment interest in autonomy in candidate support involves a different concern than applies with respect to any other form of communication. "The

[18] In *Abood*, of course, the "cause which justified bringing the group together" was "collective bargaining," and that is the phrase that appears in the opinion itself. More generally, however, the opinion recognized that the use of exacted fees is constitutionally justified "as long as [used] to promote the cause which justified bringing the group together." 431 U.S. at 222-23, *quoting Machinists v. Street*, 367 U.S. at 778 (Douglas, J., concurring).

[19] In one respect, the limitation upon the contribution of compelled fees to political candidates is a variation on the germaneness test. A candidate, even one who has taken positions similar to the group's positions on issues that directly affect the group, cannot be bound to forward the interests of those who support him, and will surely be called upon while in office to act upon matters having nothing to do with that group's interests. Thus, campaign contributions entail by necessity a substantial spillover effect into issues as to which the group has no common interest whatever.

constitutional [free speech] guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). The reason is that the election process is the base for our entire democratic system:

> [N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process, nor can it be denied that the policymaking power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. [A. Bickel, *The Least Dangerous Branch* (1962) p. 16.]

Thus, the fundamental principle at work is that granting the government any authority to encourage the involuntary aggregation of political campaign support tends to distort, in at least a symbolic way, the basic precept of free majority consent from which the remainder of democratic theory derives. This heightened sensitivity to any official governmental intervention in the balance of partisan political power is the reason, it appears, why "[i]f a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books." *Board of Education v. Pico*, 457 U.S. at 870-871; *see also id.*, at p. 907 (Rehnquist, J., dissenting) ("I can cheerfully concede . . . this . . . extreme example[]")). It is also the reason why the otherwise diverse recent commentary on government speech issues is unanimous in the conclusion that direct, unambiguous partisan candidate support is the one area the First Amendment definitely makes off limits for the government. Schiffrin, *Government Speech*, 27 UCLA L. Rev. at 613; M. Yudof, *When Government Speaks*, 170-173; T. Emerson, *The System of Freedom of Expression* (1970) 699 ("[T]he government would not be empowered to engage in direct support of a particular candidate for office. It is not the function of government to get itself reelected.").

Because of these overriding considerations, despite the government's broad authority to engage in expressive activity, "[g]overnment funds, which are collected from taxpayers of all parties on a nonpolitical basis cannot be expended for the benefit of one political party simply because that party has control of the government." *Branti v. Finkel*, 445 U.S. 507, 517 n.12 (1980).[20]

2. The second limitation imposed by *Abood* upon expenditures from compelled fees generally is simply a "germaneness" requirement; *viz.*, a requirement that the expenditure be reasonably related to the legislative purpose behind the legislative decision to require individuals with common interests to finance a common endeavor. As Justice Douglas noted:

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[20] In a related context this Court has recognized a determinative distinction between the interest in not financing partisan political campaigns and the interest in not financing other kinds of speech on public matters (including issue referenda).

In enacting the ban upon the use of corporate and union treasury funds for federal campaign contributions and expenditures, Congress was concerned in part with eliminating a "threat to the political marketplace" by insuring that " 'the money collected is that intended by those who contribute to be used for political purposes and not money diverted from another source'." *Federal Election Commission v. Massachusetts Citizens for Life*, 107 S. Ct. at 628, *quoting Pipefitters v. United States*, 407 U.S. 385, 423-24 (1972) and *United States v. Automobile Workers*, 352 U.S. 567, 582 (1957).

In the context of candidate campaign contributions, this Court has recognized the legitimacy of that concern, and of the related concern in "prevent[ing] an organization from using an individual's money for purposes that the individual may not support." *Federal Election Commission v. Massachusetts Citizens for Life*, 107 S. Ct. at 629; *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197, 208 (1982).

Where, however, the question is the validity of a broader proscription upon corporate speech on public issues generally, this Court viewed the interest in protecting shareholders from undesired association with a public issue communication the individual does not wish to support as insubstantial. *First National Bank v. Bellotti*, 435 U.S. at 794 n.34; *see also id.* at 812-822 (White, J., dissenting).

> If . . . dues are used [by a union] to promote or oppose birth control, to repeal or increase the taxes on cosmetics [or] to promote or oppose the admission of Red China into the United Nations. . . then the group compels an individual to support with his money causes beyond what gave rise to the need for group action. [*Machinists v. Street*, 367 U.S. at 777 (concurring opinion)].

As these examples demonstrate, the "germaneness' standard is neither toothless, nor does it interject the courts into fine judgments about whether this or that expenditure with exacted fees, is essential to, or necessary for achieving the legislative purpose.[21] And in most instances it is the standard that the legislature itself has followed.[22]

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[21] *Schneider v. Colegio de Abogados de Puerto Rico*, 682 F. Supp. 674, 679-81 (D. P.R. 1988), illustrates the kind of expenditures that are *beyond* the bar's legitimate concern, however broadly that concern is articulated, because those expenditures are simply unrelated to the common legal profession that binds the "latent group" brought together as the state bar. There the Bar Association expended compelled fees upon activities relating to Puerto Rican nationalism, the Samoza regime in Nicaragua, the Russian invasion of Afghanistan, the Olympic Games, Haitian democracy, condemnation of the draft as a "blood tax", and activities of the Puerto Rican Socialist Party. *Id.* at 679-80. These activities relate to neither the common interest of lawyers in a regulated profession, nor the common expertise of lawyers in the drafting and implementation of laws.

As this example illustrates, where the germaneness standard is not met, government-compelled support for expression on issues of public importance *does* come more closely to resemble recognized instances of infringement of individual freedom of mind, in that the *only* available government justification then becomes the illegitimate one of compelling support of ideas in which one disbelieves. At the same time, the government justification for exacting fees from a limited group, and not from the population as a whole, becomes unpersuasive, since there is no sense in which the limited group bears some special relationship to the expenditure in question.

[22] This case is a good illustration of this general point: The California Supreme Court determined, *on statutory grounds*, that certain expressive activities were, as a matter of legislative intent, beyond the authority of the State Bar. Consequently, there was no

The germaneness standard applies as well to the communicative activities of traditional governmental entities. A government, federal, state or local, is formed to promote the common interests of its citizens in all areas of life. Its range of discourse is necessarily equally broad and can be expected to encompass many "political or ideological" issues. Nonetheless, as we have seen (pp. 15-19 *supra*), even geographically-based governmental entities vary widely in their physical and substantive scope. And, where a governmental entity expends funds on matters plainly beyond the collective interests the entity was created to serve, the same heightened First Amendment concern exists, and the same lack of legislative justification comes to the fore.[23]

B. In *Abood*, the governmental interest fostered by Congress was the maintenance of labor-management peace through union collective bargaining. Here the state interests advanced by the Legislature are the regulation of attorneys and the improvement and advancement of jurisprudence and the administration of justice. Those

need to examine as a constitutional matter whether those activities were "germane" to a legitimate legislative purpose relating to some common interest or responsibility of the lawyers in California.

This "ultra vires" approach is likely, where governmental entities are involved, to catch most instances in which the connection between the "cause which justified bringing the group together" and the expressive activities engaged in by the resulting formal organization is tenuous. And, as the case law indicates, where the exacted fees are spent by private organizations, whose overall organization purposes and activities are beyond governmental control, the connection between the group's activities and exacted fees likely to come up as a constitutional issue is often dealt with in terms of a statutory limitation. *See* pp. 5-6 n.1, *supra*.

[23] Thus, for example, if a government representing a limited geographic entity and a defined substantive jurisdiction, such as a school board, undertook extensive advocacy of ideological positions respecting foreign policy, it would appear that the affected taxpayers have a constitutional complaint as valid as that of the members of the integrated bar in *Schneider v. Colegio de Abogados de Puerto Rico, supra*.

functions constitute the State Bar's raison d'etre and form the framework against which the petitioners' constitutional challenge must be judged.

The petitioners' complaint in this case relates not to the regulatory functions of the Bar, but to its activities regarding the advancement of jurisprudence. It is true, of course, that "advancement of jurisprudence" is a broad concept, and that, as a result of the California Supreme Court's construction of the Bar's authority in this regard, exacted fees may be spent upon commentary on, and participation in, the legislative and judicial creation and interpretation of the law generally. That is an entirely sound result.

Members of the bar share not only a common occupational interest, involving such matters as fees, legal ethics, client relations, and so on but, in addition, a common expertise—and a common professional obligation—concerning certain matters which are, inherently, matters of public interest.[24] Consequently, the state legislature has determined that lawyers as a group have not only a common self-interest, but also a common responsibility to see that their collective expertise is available to the public through a system that provides for the reasoned review

[24] This reasoning may apply in the union context as well. For example the represented employees may be members of a profession, with policy-related expertise, such as teachers, engineers, or nurses; indeed, the unions that represent such employees for collective bargaining purposes often began as professional groups. There is no inherent constitutional limitation that precludes the legislature from seeking to draw upon that common expertise. The legislature is free also to choose instead to confine the area of activity financed with exacted fees to those resolving around the employment relationship. *See Minnesota State Board v. Knight*, 485 U.S. 271 (1988) (state scheme for involving community college instructors in policy-related questions through the union chosen for collective bargaining purposes); *Cumero v. Public Employment Relations Board, supra* (teachers' union is entitled under state law to consult on policy matters, but only with the local school board, not with the legislature).

of law-related questions by as many of the state's lawyers, in the aggregate, as can be persuaded to participate.[25]

Were this system funded through general taxation, it would seem plain, on the principles explored in Part I, *supra*, that there could be no First Amendment complaint on the part of either taxpayers in general, or lawyers in particular. Thus, if there is any legitimate First Amendment interest implicated here, it would have to inhere in a total lack of "fit"—of germaneness—between the special characteristics of the subgroup required to provide the funding and the subject matter of the funding so that compelled support of ideas becomes the *only* recognizable governmental purpose behind the exaction. But as long as the expenditures do remain focused upon the cause which justified bringing the group together—in this instance, on the expertise of lawyers on the lawmaking and law interpretation process—the sense in which the funding requirement represents a compelled affirmation of belief is as attenuated and as insubstantial in constitutional terms as in the traditional taxation context.

CONCLUSION

For the reasons stated above, the judgment of the California Supreme Court should be affirmed.

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[25] This judgment is one which underlies not only the California State Bar, but the integrated bar concept generally. *See, e.g., Lathrop v. Donohue, supra*, 367 U.S. at 862 (Harlan, J., concurring), quoting the Wisconsin's Supreme Court's assessment of the purposes justifying the integrated bar:

> [T]he public welfare will be promoted by securing and publicizing the composite judgment of the members of the bar of the state on measures directly affecting the administration of justice and the practice of law. The general public and the legislature are entitled to know how the profession as a whole stands on such type of proposed legislation.

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